IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.2.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.328 of 1998
and C.M.P.Nos.9232 of 2006 264 of 2007

1.T.T.Krishna Rao
2.T.T.Rukmani
3.T.K.Prabhakar Rao .. Appellants/Defendants 1 to 3

-Vs-

1.B.S.Saraswathi Ammal
rep. By her Power of Attorney
Agent B.S.Kesavan
2.B.S.Lakshminarayanan
3.B.S.Kesavan
4.B.S.Krishnakumar
5.B.S.Harikrishnan ..Respondents/Plaintiffs

6.T.K.Roopkumar ..Respondent/Defendant No.4

The Appeal is filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 9.8.1996 made in O.S.No.3947 of 1996 on the file of the Sixth Addl. Judge, City Civil Court, Madras.

For Appellants : Ms.V.Pushpa

For Respondents : Mr.P.K.SivaSubramanian

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J U D G M E N T

This appeal is against judgment and decree dated 9.8.1996 in O.S.No.3947 of 96 on the file of the Sixth Additional Judge, City Civil Court, Madras in and by which the learned Sub Judge after analysing the evidence in depth found that the plaintiffs are entilted to suit claim and accordingly decreed the suit.

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2. For convenience, the parties are referred as arrayed in the original suit.

3. Plaintiffs state as follows:-

3.1. The defendants 1 and 2 are the owners of the House and ground bearing Old Door No.8B, New Door No.33, Pilkington Road, Ayanavaram, Madras-23. The defendants 3 and 4 are the sons of the defendants 1 and 2. The defendants 1 and 2 have purchased the suit property under a Sale Deed dated 21.5.1979. The defendants 1 and 2 have borrowed a sum of Rs.40,000/- from S.M.Shanmugham Chetty and Dr.S.Ekambaram on the security of the First Simple Mortgage dated 21.5.1979 and further borrowed a sum of Rs.15,000/- on the security of the Second Simple Mortgage dated 21.7.1979 in favour of Tmt.S.Vallinayaki. The defendants 1 and 2 being unable to pay and discharge the aforesaid mortgages have offered the suit property for sale and the plaintiffs 1 to 5 have offered to purchase for a sale consideration of Rs.5,26,000/- and the plaintiffs 1 to 5 and defendants 1 and 2 along with their sons. The Defendants 3 and 4 entered into an Agreement of Sale on 29.8.86 and inter alia agreed to complete the sale within a period of 6 months. The Plaintiffs paid Rs.2,000/- as advance on 28.8.86 and a further sum of Rs.43,000/- towards sale consideration and it was agreed that the plaintiffs as such purchasers to pay and discharge he mortgages dated 21.5.79 and 21.7.1979 referred to above and the defendants have agreed to deliver possession of the entire 1st floor to the plaintiffs at the time of discharge of the mortgages. The defendants have agreed to deliver vacant possession of all the remaining portion of the suit property to the purchasers by the plaintiff on or before the date of registration.

3.2. In due compliance of their obligation under the agreement of sale the plaintiffs paid a sum of Rs.78,900/- on 21.10.1986 on behalf of the defendants 1 and 2 to S.M.Shanmugam Chetty, and Dr.S.Ekambaram, in full discharge of first Simple Mortgage dated 21.5.1979 and obtained a receipt on 24.10.1986. The plaintiffs further paid a sum of Rs.34,000/- to S.Vallinayaki on 30.10.1986 and obtained a receipt from S.Villinayaki in full discharge of the Second Simple Mortgage dated 21.7.1979 pursuant to the agreement of Sale and of the payment and discharge of the Mortgages dated 21.5.1979 and 21.7.79 the defendants put the plaintiff in possession of the entire first floor in terms of Clause 7 of the agreement of sale and the plaintiffs received and retained all the title deeds of the suit property from the Mortgagees, pursuant to the letter of authority dt, 30.10.1986 executed by the defendants 1 and 2. The plaintiff got subrogated to the rights of Mortgagee under the Mortgages dated 21.5.1979 and 21.07.79.

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3.3. The defendants 1 and 2 by their letter of confirmation dated 30.10.1986 confirmed having received a total sum of Rs.1,75,000/- fixing the balance sale consideration payable as Rs.3,51,000/- apart from the letter dated 24.10.1986 confirming the handing over of vacant possession of the first floor to the plaintiffs permitting the plaintiffs to use and occupy the first floor. The defendants 1 and 2 received a further amount of Rs.15,000/- and acknowledged the receipt on 24.10.1986. The defendants 1 and 2 by their letter dated 23.12.1986 confirmed having received a sum of Rs.25,000/- from the plaintiffs from and out of the sale consideration, on 23.12.1986 and the defendants received a sum of Rs.8,500/- on 18.2.1987 and a further sum of Rs.16,500/- from the plaintiff on 19.2.1987 and confirmed the total payment of the sum of Rs.2,25,000/-.

3.4. There were two tenants in the premises and they were not vacated and therefore the time stipulated under the agreement of Sale dated 29.8.1986 was extended upto 31.3.87 by mutual consent. After receiving the amounts and extending the period upto 31.3.87, the defendants have not made any attempt to finalise the sale deed and as a result the plaintiffs sent a letter on 24.2.87 requesting the defendants 1 and 2 to complete the sale within the agreed time and also to make arrangements to obtain vacant possession of the suit property by a letter dated 26.2.87. The defendants 1 and 2 sent a reply on 4.3.87 through the counsel disputing value of the property and stated that the tenant Varadarajulu Naidu has not vacated and requested the plaintiffs to accept the sale of the property and wanted the draft sale Deed to be sent by the plaintiffs. The defendants 1 and 2 further requested for extension of time to deliver vacant possession upto 31.3.87 and assured that there will not be any undue or unnecessary delay on her part in registering the Sale Deed and requested the plaintiffs to grant of 6 months. In response to a letter dated 4.3.87 the plaintiff sent a reply dated 19.3.87 enclosed two copies of the draft sale deed fixing the sale consideration at Rs.3,50,000/- with the consent and approval of the defendants and the plaintiffs called upon the defendants to furnish the Certificate under Sections 230-A of the Income Tax Act. The defendants took the draft Sale Deed on 20.3.87 and retained a Draft Sale deed without approving the same and thereupon, the plaintiff sent reply on 7.5.1987 calling upon the defendant to furnish the Certificate under Sec.230-A of the Income Tax Act and Complete the sale on or before 15.5.1987 stating that they are always ready and willing to pay the balance sale consideration and complete the sale of the property without any further delay.

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3.5. The defendants 1 and 2 vacated one of the two tenants in the ground floor and obtained vacant possession and had taken legal proceedings against another tenant Mr.Varadarajulu Naidu. The defendants are evading to complete the same inspite of repeated request and the defendants 1 and 2 set up the defendants 3 and 4 to send a notice on 2.5.87 containing false allegation.

3.6. Thereafter also, the defendants have not come forward to execute the sale deed as per the agreement of sale and understanding. Hence the suit.

4. Defendants 1 and 2 state as follows:-

4.1. Defendants state that under the suit Sale agreement, time for completion of sale as six months from 29.8.1986 i.e. on or before 29.2.1987. But the plaintiffs taking advantage of the old age of these defendants and the wife of the first defendant coerced them into signing a letter dated 19.3.1987, purporting to extend the time for completion of sale as drafted by their counsel and these defendants see that such letter of extension of time was extorted to be executed by these defendants alone without obtaining the consent of their two sons as defendants 3 and 4 herein as such joint owners of the property which is fully recognised in the recitals throughout in the several clauses of agreement of sale and hence such letter seeking extension of time is per se invalid and cannot operate as claimed by plaintiffs to be valid and binding and hence there is no subsisting contract of sale of property entitling the plaintiffs to claim specific performance of the sale of the property in these proceedings.

4.2. Besides the above infirmity, contrary to value of property as agreed in the sale agreement, the plaintiffs under the advice of their legal adviser and for their own reasons mentioned the sale value of property in the draft sale deed as Rs.3,50,000/- only instead of Rs.5,25,000/- and thereby have clearly attempted to play fraud on the government excheques to the tune of Rs.1,75,000/- by suppressing the said amount and seeking to undervalue the property for purposes of stamp duty although it is now sought by plaintiffs to twist the whole matter and seeking for shift such criminal responsibility to these defendants as though such undervaluation and suppression of real amount of sale was attempted to be done at the instance of these defendants to avoid payment of capital gains tax.

4.3. The plaintiffs in their frantic attempt to escape their criminal liability out of their seeking to play fraud on the state excheques, have gone to the extent causing a notice to be published news papers notifying the public about the suit matters and seeking to defame these defendants and these defendants and therefore

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reserve their right to claim damages against the plaintiffs for such baseless advertisement with Criminal intent to defame them in the matter.

4.4. Hence the suit is liable to be dismissed.

5. Defendants 3 and 4 state as follows:-

5.1. The plaintiffs are not entitled to any relief due to their own conduct in that they have made an open attempt to play fraud upon the proposed Sale Deed of the suit property by suppressing the real value of the property in their draft Sale Deed wherein they have under valued the suit property as Rs.35,000/- instead of the real consideration of Rs.5,26,000/- as per the sale agreement dated 29.08.1986 by this very fact, it is crystal clear that the plaintiff have made an attempt to defraud the defendants in the suit and more particularly these defendants who have been purposely omitted from all subsequent transaction in this connection. Therefore the plaintiffs have not come to this Court with clean hands as to their claims, for the relief of specific performance due to their own latches and hence the above suit is liable to be rejected in limine with our costs.

5.2. These defendants are the sons of the defendants 1 and 2 and they are also the parties to the agreement entered into between the plaintiffs and defendants herein and this agreement was made at Madras on 20.08.1986 for the sale of the suit property for a value of Rs.5,26,000/-. The suit property was acquired by the defendants herein as a joint family property having purchased the same from and out of the common and joint family funds and as such the suit property is the joint family property belonging to all the four defendants herein.

5.3. The defendants brother T.K.Mallikarjuna Rao died on 12.10.1976 in Air Accident of Carevelle Air Crash at Bombay and in this connection a sum of Rs.1,00,000/- was awarded out of the Accident Insurance Policy by the Oriental Fire & General Insurance Co. Ltd., and also a sum of Rs.15,659.25 was received from the deposits made by the deceased T.K.Mallikarjuna Rao in Canara Bank, Koliwada, Bombay -22 in the savings A/c.No.2893 and these amounts came into the hotchpot of the Joint family of the defendants herein for the joint user and benefit of the joint family constituted by all the four defendants. And as such the suit property in question which was purchased on 21.5.1979 by the end, out of the common funds is a property belonging to the joint family entitled to be enjoyed by all the defendants with their due interest and shares thereof.

5.4. The time for completion of the sale shall be 6 months from the date of agreement of sale and that shall be the essence of the contract. The plaintiffs were not ready for the completion of the sale deed. The plaintiffs manoeuvred to get the said sale

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agreement extended for a further period of six months by deceiving the 1st and 2nd Defendants herein and obtained only the signatures of the first and 2nd defendants whereas the 3rd and 4th defendants had no notice of information as to the extension of this agreement and these defendants 3 and 4 have been conveniently omitted and avoided from the second agreement said to have been extended upto 31.3.1987 by mutual consent.

5.5 These defendants have no necessity at all to be in collusion with the first and the second defendant, since these defendants are joint owners having joint rights of the suit property. The deliberate conduct of the plaintiffs in keeping these defendants away from the contract for the sale of the suit property is a criminal omission done by the plaintiffs and as a result of which the agreement of sale has become unenforceable and inoperative and hence the plaintiffs cannot have any relief of specific performance in this matter.

5.6. The plaintiffs have caused the public notice in some dailies about the suit matter purporting to defame these defendants. These defendants 3 and 4 reserve their right to claim damages against the plaintiffs for such meaningless and frivolous publications made in the papers with criminal intent so as to mar the reputation of these defendants and to defame them in this matter. Therefore the suit is liable to be dismissed.

6. Third plaintiff was examined as P.W.1. Exhibits A.1 to A.22 were marked on the side of the plaintiffs. First defendant was examined as D.W.1. Though D3 and D4 filed written statement objecting the claim of the plaintiff, they have not let in evidence to sustain their claim.

7. The lower court after analysing the evidence in depth found that the plaintiffs are entitled to suit claim and accordingly decreed the suit.

8. The present appeal is filed by defendants 1 to 3 against the plaintiffs.

9. Heard Ms.V.Pushpa, learned counsel for the appellants and Mr.P.K.SivaSubramanian, learned counsel for the respondents.

10. Upon hearing the rival claims, the points for determination are:-

1)Whether the first and second defendant are the owners of the suit property?

2)Whether the allegations stated in the written statement of D3 and D4 were proved?

3)Whether the plaintiff was ready and willing to perform his

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part of contract?

4)Whether the delay in execution of sale deed was due to the fault of D1 and D2?

5)Whether the finding of the lower court in decreeing the suit is in order?

11. Point 1:-

11.1. The records would show that D1 and D2 are the absolute owners of the suit property. Though D3 and D4 filed written statement claiming right over the suit property, they have not let in evidence to sustain their claim. Whereas D.W.1 has clearly stated that the suit property is absolutely owned and possessed by D1 and D2. The lower court also taking cognizance of the evidence of D.W.1, rightly held that the suit property is owned and possessed by D1 and D2 and that D3 and D4 had no right over the same and the finding of the lower court in this regard reads as follows:-

> "The defendants 3 and 4, though claimed title over the suit property along with the defendants 1 and 2, have not gone into the box to say that they have also contributed something to purchase the suit property by their joint execution was thereby, the suit property took the character of joint family property. At the time of the cross examination, D.W.1 was assertive, that his sons had no title over the suit property and his own words" *சொத்து எனக்கும் என் மனைவிக்கும் மட்டும் தான் உரிமையானது* " Therefore we need not unnecessarily strain ourselves to find out the nature of the suit property or whether the defendants 3 and 4 had any title to the suit property or not. Therefore, I hold on the evidence given by D.W.1 that the suit property absolutely belongs to the defendants 1 and 2 alone in which the defendants 3 and 4 have no semblance of right except the blood relationship with the parents namely the defendants 1 and 2. "

12. From the narration of the above events, I am satisfied that D1 and D2 are the owners. D3 and D4 have no right at all and this point is answered in favour of the plaintiffs.

13. Point 2:-

Defendants 3 and 4 filed the written statement alleging that they have right over the suit property and that defendants 1 and 2 without their consent have given a letter to the plaintiffs extending the time to perform their part of contract and that the time is essence of the contract and therefore the suit is liable to be dismissed. But the defendants 3 and 4 have not entered appearance to sustain their objection. It is specifically alleged by D3 and D4 in their written statement that Ex.A.11 letter dated 16.2.87 was given by D1 and D2 to the plaintiff without their knowledge and consent. If, the contention of D3 and D4 is true,

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they ought to have let in evidence to substantiate their claim. But, they have not done so. Various allegations in the written statement of D3 and D4 remains only on paper but not sustained by them. In such view of the fact, I am satisfied that allegations made by D3 and D4 in the written statement were not proved. Therefore this point is against defendants 3 and 4.

14. Point 4:-

14.1. Though there is a specific clause in the agreement of sale that sale transaction shall be completed within 6 months, the period of transaction was extended by the mutual act of the parties. The records would show that the time extended by mutual consent upto 31.3.87. Ex.A.11 is the proof to this fact. At this juncture, it is useful to refer Ex.A.14, letter dated 4.3.87 sent by D1 and D2 to the plaintiff as a reply to Ex.A.13. The sum and substance of Ex.A.14 exposing the mind of the parties reads as follows:

"V.KUMARASAMY
Advocate

No.10 Law Chambers,
HighCourt Buildings,
Madras-600 001.
4.3.1987

To
1.Smt.B.S.Saraswathi Ammal
2.B.S.Lakshminarayana
3.B.S.Kesavan
4.B.S.Krishna Kumar
5.B.S.HariKrishna
No.13, Ponnappa Chetty Street,
Madras-600 003.

Madam/Sirs,

Your notice dated 24.02.1987 sent to my clients T.Krishna Rao & T.K.Rukmaniammal of No.33, Pilkington Road, Ayanavaram, Madras-23, has been placed in my hands with instructions to reply thereto as follows:-

In the first place my clients state that they have given you possession of the entire first floor portion of the extent of 1200 sq.ft., built at a cost of rs.3 Lakhs and 60 thousands at the rate of Rs.300/- per square feet.

As regards the ground floor portion in the occupation of the tenant R.Varadarajulu Naidu, you are well aware of the fact that he is seriously ill and confined to bed and that my clients have given symbolical possession of the said portion to you, by attornment of tenancy, as it is not possible for them to give delivery of vacant possession of the same in the present state of the tenant's health. You are also

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aware that proceedings are pending in the Courts against the said tenant for recovery of possession. Apart from this, there is another portion kept vacant of which possession can be taken.

My clients state that so far as they are concerned, they have purchased a plot of land and intended building a house for their residence for which they require at least six months time, to enable them to complete the construction and shift to their newly constructed house.

In the circumstances and for the reasons stated above, my clients require a period of six months after the registration of the Sale Deed, which they will execute and register on an auspicious day in the month of April 1987 and my clients hope that you will be kind and generous enough to grant this extension of time and not to insist upon delivery of possession by 31.3.1987 which they consider to be impossible to vacate within such a short period. My clients did not send the letter dated 16.2.1987 referred to in your notice. The said letter was brought by you and my clients signature obtained therein.

My clients request you to return the receipts for the title deeds given to you as well as the discharged mortgage deed. My clients expect you to send the draft Sale Deed for approval and to apply for the income Tax Clearance certificate. My clients state that there won't be any undue or unnecessary delay on their part in registering the Sale Deed. If this reasonable request for 6 months time is given.

Yours faithfully, "

14.2. The genuineness of transaction was admitted. The symbolic possession of the portion of the tenant S.Varadarajuly Naidu was taken by the plaintiffs and the tenancy was also attorned in his favour. The defendants requested the plaintiffs to take over another portion which kept vacant.

14.3. The defendants requested six months time to vacate and hand over the portion under his occupation after construction of building in the lands purchased by them. The defendants requested for registration of sale deed in the month of April 87 on an auspicious day. Moreover, further six months time for completion of transaction sought for by defendants 1 and 2 was reasonable according to them. The recitals in the said reply would prove that the plaintiffs were ready and willing to perform their part of contract after paying the balance consideration for which defendants were postponing the same due to the reasons referred in

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Ex.A.14. The lower court also taken cognizance of recitals in Ex.A.14 and found that the plaintiffs are entitled to suit claim. The lower court also found that the delay in execution of sale deed was due to the fault of the defendants and ultimately concurred with the submission of the plaintiffs.

15. From the narration of above events, I am satisfied that plaintiffs are entitled to suit claim. Hence, the findings rendered in points 1 to 4 are answered in favour of the plaintiffs.

16. I am of the considered view that plaintiffs are entitled to suit claim. The lower court after analysing the evidence in depth rightly came to a conclusion that plaintiffs are entitled to the suit claim. I do not find any illegality or impropriety in the findings of the lower court. The findings of the lower court is in order and does not require any interference. Accordingly, the appeal fails and the same is dismissed. However, the parties have to bear their respective costs. Consequently, connected miscellaneous petitions are closed.

Nvsri

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
The Sixth Addl. Judge, City Civil Court, Madras.
2. The Registrar, City Civil Court,Chennai
3. The Record Keeper, VR Section, High Court, Madras

+ one cc to Mr. M. Muniruddin Sheriff, Advocate sr no. 12559
+ one cc to Mr. P.K. Sivasubramanian,Advocate sr no. 12143

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